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Supreme Court of the United States

OCTOBER TERM, 1902.

No. 238.

Office Supreme Court U. S.
FILED
APR 11 1903
JAMES H. McKENNEY,
Clerk.

JEFFERSON B. CONLEY,

Plaintiff in Error,

against

THE MATHIESON ALKALI WORKS.

BRIEF ON BEHALF OF THE DEFENDANT IN ERROR.

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UNITED STATES SUPREME COURT.

JEFFERSON B. CONLEY,
Plaintiff in Error,

vs.

THE MATHIESON ALKALI WORKS,
Defendant.

BRIEF IN BEHALF OF THE DEFENDANT IN ERROR.

Preliminary Statement of the Case.

This is a question of jurisdiction upon writ of error to the United States Circuit Court for the Southern District of New York, upon its determination that it had no jurisdiction of the defendant (p. 2, fol. 5), by reason of which the Circuit Court set aside the summons and the pretended service thereof as null and void and of no effect (p. 123, fol. 237).

The Circuit Court, upon the papers and the report of a master appointed (p. 54, fol. 103) to take testimony and report upon the questions of fact involved, found "as a "fact that at the time of the alleged service of the sum- "mons in this action the defendant corporation did not "have any agent, office or property within the State of "New York and was not doing business within the State "of New York" (p. 123, fol. 237), *held*, that the case of

Note.—Citations in this brief are to the printed pages of the record.

Goldey *vs.* Morning News, 156 U. S., 518, and Wabash Western Railway *vs.* Brow, 164 U. S., 271, were therefore controlling, and that the Court had acquired no jurisdiction of the defendant.

Undoubtedly, these cases are decisive upon the question of jurisdiction raised upon this Appeal, if the facts have been correctly found by the Circuit Court.

Statement of Facts.

I.—This action is for a personal judgment against the defendant Mathieson Company, for its alleged breach of a contract (pp. 9, 10), with plaintiff's assignee, T. T. Mathieson, always a citizen and resident of Great Britain (p. 3, IV.), under which he was to render services at Saltville, Virginia, for two or three years at 3,000 pounds sterling per anuum, and for five other years (balance of eight years) at 1,500 pounds sterling per annum, during which period of five years "said Mathieson should not be "required to spend any more time in America than he "may elect to spend"; The Mathieson Company to "provide a suitable residence for said T. T. Mathieson at Saltville, Virginia, during said eight years, &c.," and to also pay him a percentage upon certain net profits from the Mathieson works at Saltville, Virginia, over 60,000 pounds sterling per annum. The contract recites that Mathieson Alkali Works is a Virginia corporation "with "headquarters located at Saltville in said state."

The complaint alleges failure to pay the 1,500 pounds sterling for the last five years and for an accounting of profits at Saltville.

It needs no argument to show that failure to pay occurred, and the cause of action, if any, arose either at Saltville or in England, not in New York. This is self-evident. Both parties were strangers to New York.

Mathieson was a citizen of Great Britain and was to be either at Saltville or not in America, and payments were to be made in pounds sterling. The "headquarters" of the Company were located at Saltville.

There is no basis for any claim by plaintiff, Mathieson's assignor for the purpose of bringing this action, that the cause of action arose in New York.

II.—It is admitted in the record (pp. 55, 56) and alleged by plaintiff in his complaint (p. 31, III, VI, VII), that the defendant Mathieson Company is a corporation of the State of Virginia, duly organized there in August, 1892, for the manufacture of salt, bleaching powder and chemicals of all kinds, with its manufacturing plant and works at Saltville, in said state (p. 61).

It is also both admitted (p. 55, 56) and alleged by plaintiff in his complaint (p. 31, IV) that Castner Electrolytic Alkali Company is also a corporation "duly incor- "porated under the laws of the State of Virginia, July, "1900, and still exists as such corporation" (p. 59).

III.—On April 18th, 1901, the plaintiff attempted to begin this action against the defendant Mathieson Company in the New York Supreme Court, by delivering on said day a copy of the Summons and complaint, in the City of New York, to John G. Agar and R. T. Wilson, two members of the Board of Directors, neither of whom were officers of the defendant. "Neither of them is or has been at "any time an officer or agent of the defendant, or author- "ized to represent it or engaged in any way in the con- "duct or management of its affairs except merely in an "advisory capacity as members of the Board of Directors" (Affidavit of Mr. Arnold, President of the Company, at p. 21).

The defendant appearing specially for that purpose only, duly removed the action to the Circuit Court of the United

States for the Southern District of New York, and then at once moved to set aside the summons and its service as null and void on the ground, that the defendant was a corporation of the State of Virginia, having no office, no property and no agent within the State of New York, and not doing business within said state (Goldey *vs.* Morning News; Wabash Western Ry. *vs.* Brow).

After hearing argument upon this motion and considering all the affidavits and papers submitted by both parties, and the question of fact having been raised as to "whether or not at the time of the service of the sum-"mons in this action, the defendant corporation was "doing business within the State of New York," the matter was referred by the Court to Arthur H. Masten, Esq., as a Master, to take testimony and report (p. 53, 54). This reference proceeded; both parties were represented before the Master by counsel (p. 55), and in addition to the pleadings and affidavits before the Court, testimony was taken covering 63 printed pages of the record (pp. 55–118). No evidence was submitted by the plaintiff.

IV.—The further facts in the case are summarized in the Master's report, which appears in full in the printed record, pages 119 to 121, to which the attention of the Court is particularly called by the defendant as a refutation on its face of the plaintiff's claim respecting the situation of the Mathieson Company in the State of New York at the time of the pretended service of the summons in this action, April 18th, 1901.

The following extracts from the Master's report summarize the most material facts:

"The defendant is a corporation duly organized and "existing under the Laws of the State of Virginia, and "since the year 1893, has maintained and operated an "extensive plant in Saltville, Virginia, for the manufac-

"ture of salt, caustic soda, soda ash and bicarbonate of "soda."

"Prior to December 31, 1900, said defendant also owned "and operated a plant for the manufacture of caustic soda "and bleaching powder by electricity, located at Niagara "Falls, in the State of New York, under a patented "process known as the Castner Electrolytic process" (p. 119, fol. 229).

"By an instrument in writing, bearing date the 31st "day of Decembe 1900, and executed by its President "on the 24th day of January, 1901, said defendant cor- "poration sold and transferred to a corporation known "as the Castner Electrolytic Alkali Company, organ- "ized under the laws of the State of Virginia, all the "plants, rights and property of every kind and descrip- "tion of the Mathieson Alkali Works at Niagara Falls in "the State of New York, together with all inventions, "patents and patent rights owned and used by it or in "connection with its said works, together with all trade- "marks and the good will of the business as a going "concern, free of all encumbrances, except as to the con- "tinued rents, royalties or charges under any existing "leases or agreements" (p. 119, fol. 230).

* * * * *

"Said instrument was duly delivered and the physical "transfer of the property therein specified was made dur- "ing the month of January, 1901, and said instrument "was placed on record in the County of Niagara and "State of New York, on the 15th day of February, 1901" (p. 119, fol. 230).

* * * * *

"The defendant corporation since a period prior to the "31st day of December, 1900, had and still has its prin- "cipal office for the transaction of business in the City of "Providence, at which its records and books of accounts "are kept, and an office force of several employees is

" engaged. The bank account of said defendant was dur-
" ing the period in question and is now kept in the City
" of Providence. It has no office within the State of New
" York, none of its books, records or accounts are kept in
" this State, nor has it since January 1st, 1901, sold any
" of its products here " (p. 120, foot of fol. 231).

* * * * *

" Upon the facts thus outlined it does not appear that
" the defendant corporation was at the time of the service
" of the summons herein, viz., April 18, 1901, doing busi-
" ness within this State " (New York).

" The fact that it held the entire capital stock of the
" Castner Company and that the operations of that Com-
" pany were carried on under the same management as
" before December 31, 1900, is not material. The new
" corporation was a separate legal entity." * * *
" It was that corporation alone which transacted any
" business in this State (since December, 1900) notwith-
" standing it may have been for all practical purposes
" merely the instrument of the defendant corporation."
(People *vs.* Am. Bell Telephone Co., 117 N. Y., 241;
United States *vs.* Same, 29 Fed. Rep., 17; p. 121, fol.
223.)

Counsel might also cite 13 Peters, 587, upon this same point.

V.—Upon the report of the Master, and upon all the affidavits and other proceedings, the Court, on the 21st day of January, 1902, made its order approving and confirming the report of the Master in all respects, and setting aside the summons and the service thereof as null and void.

The attorneys for the plaintiff in error duly excepted to the Master's report and filed their assignment of errors to the findings of the Court upon the following points to the effect (pp. 123, 124):

That it was error to find with respect to the time when the summons was served on the Mathieson Alkali Works.

(I.) That the business dealings of the defendant corporation with Arnold, Hoffman & Co., were carried on through the Providence office of said Arnold, Hoffman & Co.

(II.) That the Mathieson Alkali Works had no office within the State of New York.

(III.) That the Mathieson Alkali Works had not since January 1st, 1901, sold its products within the State of New York.

(IV.) That the Mathieson Alkali Works at the time of the service of the summons in this action, viz.: April 18, 1901, was not doing business within the State of New York.

(V.) That the Court erred in setting aside said summons and declaring the same to be null and void.

Writ of error was then taken by plaintiff to this Court.

VI.—In support of each of the findings, the testimony of Mr. Gladding, the Treasurer of the Mathieson Company on April 18, 1901, and for four or five years prior thereto (p. 56, fol. 109), is specific and positive.

It seems unnecessary in this brief to do more than call attention to a few extracts from this testimony to show that the contention of the plaintiff in error as to these findings and his exceptions are without foundation.

1. Upon the sales of the Mathieson Company products, the testimony of Mr. Gladding is as follows:

On page 66, on cross-examination:

"Q. What relation has Arnold, Hoffman & Company to your concern? A. They are the selling agents.

Q. Where is there place of business? A. They have offices in several cities. Their *head office is in Providence.*"

On pages 115, 116, on re-direct examination:

"Q. You have been asked on your cross-examination some questions relating to the sale of its products by The Mathieson Alkali Works; please state how the products of The Mathieson Alkali Works were sold for the period of a year prior to April 18, 1900? A. Except for salt and bi-carbonates, which are sold from Saltville (Virginia), all the product of The Mathieson Alkali Works is sold from Providence, under the direction of Mr. Arnold, of Arnold' Hoffman & Company, who are also in Providence. Arnold, Hoffman & Company act only as the selling agents, subject in every instance to The Mathieson Alkali Works.

Q. Are all sales in every instance submitted to The Mathieson Alkali Works at Providence? A. They are, in every single instance.

Q. And approved or disapproved at Providence by the Company? A. In every instance.

Q. Before being accepted? A. In every case.

Q. Excepting those sold at Saltville? A. Excepting those sold at Saltville.

Q. What is Arnold, Hoffman & Company? A. Arnold, Hoffmann & Company is a firm, doing a general chemical business and acting in relation to The Mathieson Alkali Works as its selling agents.

Q. Is Arnold, Hoffman & Company a corporation or not? A. Yes, sir. A corporation of the State of Rhode Island.

Q. Where does it have its head office and place of business? A. At Providence.

Q. Where do you have your dealings with Arnold, Hoffman & Company. That is I mean where do you as an officer of The Mathieson Alkali Works have all your dealings with Arnold, Hoffman & Company? A. At Providence, only.

Q. You have alluded in your testimony, or counsel for the plaintiff has made reference to Arnold, Hoffman &

Company in New York. What are the facts in reference to that? A. The facts in reference to that are, so far as dealings are concerned by The Mathieson Alkali Works with Arnold, Hoffman & Company, we do not know of the existence of them in New York. Our dealing are only and solely with Arnold, Hoffman and Company in Providence.

Q. Are your products sold on contract for future deliveries or not? A. They are largely so. On contract for future delivery. Almost entirely, almost altogether sold on contracts for future delivery.

Q. And these contracts are submitted to The Mathieson Alkali Works at Providence before being accepted by it? A. In every case.

Q. And these contracts in every case are accepted on behalf of The Mathieson Alkali Works only at Providence? A. Yes.

* * * * *

Q. And who pays for the goods? A. Arnold, Hoffman & Company pay The Mathieson Alkali Works.

Q. Where? A. At Providence.

* * * * *

Q. Have you any dealings or has The Mathieson Alkali Works any dealings with reference to these goods except with Arnold, Hoffman & Company in Providence? A. They have not."

Counsel for the defendant would call attention here to what appears in plaintiff's brief to be a misquotation from Mr. Gladding's testimony on this point.

On page 11 of his brief, plaintiff's counsel quotes Mr. Gladding in the last question and answer on said page as follows:

"Q. But how many times or when you cannot tell? A. "I cannot. *Arnold, Hoffman & Company's place of* "*business is in the City of New York.*"

But no such answer can be found in the record. On

page 71, folio 139, it will be found that the answer in question consists only of the words "I cannot."

"Q. But how many times or when you cannot tell?"
"A. I cannot.

"Q. Who is President of the Alkali Company now?"

The words "*Arnold, Hoffman & Company's place of business is in the City of New York*" inserted in the plaintiff's brief as a quotation, is not part of Mr. Gladding's answer to the question. Nor can any such statement be found anywhere in the record. Mr. Gladding has, on the contrary, testified repeatedly that Arnold, Hoffman & Company's place of business is in Providence, and that they have only a branch office in New York.

As it is a part of plaintiff's contention, without, however, anything in the record to support it, that Arnold, Hoffman & Company's chief place of business is in New York, we call attention to the matter here at length, that the Court may not be misled by this incorrect statement in plaintiff's brief.

Mr. Gladding testifies further with reference to the dealings of the Mathieson Alkali Works with Arnold, Hoffman & Company.

On page 98:

"Q. Do you get anything from Arnold, Hoffman & Co. (referring to information regarding sales)? A. Yes, sir.

Q. Are they not in New York? A. It is not reported to me from New York. It is reported to me from their Providence office, which is the only office I recognize, where they do their business is their affair, I do not know" (p. 98, fol. 189).

* * * * * *

And on page 99:

"Q. And Arnold, Hoffman & Company carry on their business here (that is in New York)? A. Their office is in Providence. The office of Arnold, Hoffman & Co. is in

Providence. That is where the President and Treasurer of that Company are.

Q. They do not do any business here, then? A. Yes, they do; I am told they maintain an office here; but that is not their principal office.

* * * * * *

Q. Do they do their main business in Providence? A. Yes, sir.

Q. Do they sell their goods there? A. Yes, sir."

And the Master's report uses the following language:

"The corporation of Arnold, Hoffman & Co. has a "branch office in the City of New York, but the business "dealings of the defendant corporation and of the Cast- "ner Company with Arnold, Hoffman & Co., are carried "on through the Providence office of said last-mentioned "corporation." "Nor has it (the Mathieson Company) "since January 1st, 1901, sold any of its products here "(New York)" (p. 120, fol. 231).

Evidently the Master's finding is proper and accords with the evidence.

2. Mr. Gladding also testifies further, on page 117:

"Q. Has The Mathieson Alkali Works, since the sale of the plant at Niagara Falls to the Castner Electrolytic Alkali Company, had any office or place of business of any kind in the State of New York? A. It has not.

Q. Has it had any books of account or any records or any clerks in the State of New York? A. It has not.

Q. Has the Mathieson Alkali Works had any financial agency of any kind in the State of New York? A. It has not.

Q. Since that time or before that? A. Neither before nor since.

Q. Has the Mathieson Alkali Works at any time since you have been the Secretary and Treasurer of the Company had any office for any purpose whatever, or any

books or records at No. 33 Wall Street, New York City? A. They have not."

On page 118, upon re-direct examination:

"Q. Has the Mathieson Alkali Works at any time since you have been the Secretary and Treasurer of the Company, had any office for any purpose whatever or any books or records at No. 33 Wall Street, New York City? A. They have not.

Q. You were asked in your cross-examination with reference to the plant and property of the Mathieson Alkali Works at Saltville, Virginia. Will you state about how much the investment of the Company is at Saltville, Virginia, in round figures of millions of dollars? A. About three and a half to four millions of dollars.

Q. Is it true or not that the entire original capital of the Company was invested at Saltville, Virginia? A. It was.

Q. And that no part of it was invested anywhere else? A. It was not."

There is not in the record a single word of proof to indicate that since the sale of the Niagara plant to the Castner Company iu January, 1900, The Mathieson Company has had any office, agency, agent, employee, or property, or transacted any business of any kind within the State of New York.

3. Counsel for the plaintiff in error refers to financial dealings of the Mathieson Alkali Works with the banking house of R. T. Wilson & Company, but with respect to this the testimony is specific that the Mathieson Company merely borrowed money from Mr. Wilson's firm.

Mr. Gladding's testimony upon cross-examination is as follows (p. 82):

"Q. R. T. Wilson had a running account with the Company, did it not? A. As lenders of money only.

Q. Did the company ever deposit money with R. T. Wilson & Company? A. No, sir, not to my knowledge.

Q. Do you know whether it did or not? A. It has not within my knowledge. (Witness had been Treasurer about 5 years, p. 56).

Q. Did it since your connection with it? A. It has not.

Q. On what bank does it draw checks to pay bills with? A. On a bank in Providence.

Q. On no other? A. On no other except one in Virginia."

The Master finds that the Mathieson Alkali Works "has no office within the State of New York; none of its "books, records or accounts are kept in this State, nor "has it since January 1st, 1901, sold any of its products "here" (p. 120, fol. 231).

The finding seems to be fully supported by the evidence.

VII.—It is wholly immaterial to the question of jurisdiction whether the Mathieson Alkali Works owns all the stock of the Castner Electrolytic Alkali Company or not, or whether the directors of the two companies are the same or not.

Or whether the product of the Castner Company at Niagara is sold by the same selling agents, Arnold, Hoffman & Company, which sell the products of the Mathieson Company in Virginia.

Nor whether the Mathieson Company has borrowed money of the banking house of R. T. Wilson & Co.

Nor whether Mr. Wilson owns more or less of the capital stock of the Mathieson Alkali Works.

None of these matters are of the slightest importance, and although the plaintiff's counsel dwelt upon them as if they attached weight, they have no bearing upon the question of jurisdiction involved in this appeal.

VIII.—Much stress is also laid by plaintiff's counsel upon the fact that in 1896, when the Mathieson Company built its Niagara plant, a by-law was adopted providing that the directors in addition to other meetings, should hold a regular monthly meeting in the City of New York, but it does not follow from this that the company had an office in the City of New York at the time of the beginning of this action; and the positive testimony of Mr. Gladding, the Secretary and Treasurer; the affidavits of Mr. Arnold, its President; Mr. R. T. Wilson Mr. Agar, two of its directors, stating positively that there was no office in the City of New York, and had not been for some time, must be regarded as conclusive in support of the finding of the Master. Having sold out its Niagara plant and patents, the Mathieson Company retired wholly and absolutely from New York State.

With respect to any meetings that were held in New York, the testimony is, that they were held at the office of R. T. Wilson & Company, or the *branch* office of Arnold, Hoffman & Company.

The Master, in his report, uses the followning language:

"It did not appear that meetings of the directors had "been held in accordance with this by-law, the fact being "that they were held sometimes in Saltville and some-"times in Providence, and during the year 1901, at least, "were held not more than two or three times in this city, "and then at the branch office of Arnold, Hoffman & "Company, the selling agents, or at the office of Messrs. "R. T. Wilson & Co., bankers, in Wall Street" (fol. 232).

No inference can be drawn from the mere holding of a directors' meeting in New York, that the Mathieson Company, after the sale in December, 1900, of its Niagara plant and property, had any office in New York, and any possible inference is negatived absolutely by the sworn statements above referred to of Mr. Arnold, of Mr. Wil-

son and of Mr. Agar, and by the testimony already quoted of the Treasurer, Mr. Gladding.

Nor would the mere holding of a directors' meeting in New York by the Mathieson Company since December, 1900, under the facts shown in the record, be doing business within the State. Moreover, the by-law referred to adopted in 1896, appears by the testimony to have been "superseded" or "amended" as the witness, who is a layman, calls it (pp. 73–74).

The New York courts in the recent case of Dives-Pelican Mining Co. *vs.* Feitner, 77 App. Div., 189, decided in January, 1903, have held with respect to a foreign corporation, not only that "the fact that it had an office "here and was authorized to do business, did not make "it 'doing business,'" within the State, but that having an office and holding directors' meetings for the purpose of declaring dividends and having the cash in bank in New York for the purpose of paying such dividends, was not doing bnsiness in the State of New York, and also that such bank deposit was not even liable to taxation in New York, because the Company was not doing business there.

It would be a novel proposition to hold that a corporation was doing business in every State where any of its directors happened to reside. It cannot be seriously contended by plaintiff that a corporation is doing business in a State foreign to its domicile or residence, simply because one of its directors, performing no other duties except as an adviser in directors' meeting, and not otherwise acting in any capacity for said Company, happens to reside in such foreign State. Yet that appears to be one of the propositions upon which plaintiff's counsel rests his claim of jurisdiction of the Mathieson Alkali Works in the State of New York in the present case.

IX.—Plaintiff's exceptions to the findings of the Master

and of the Circuit Court are devoid of merit, for the reason, first, that there is no evidence to support any exceptions, and second, that not only are all the findings in accordance with the evidence, but no other findings would be possible or could be sustained upon the record.

Argument.

I.—The facts being, as found by the Circuit Court, that at the time of the alleged service of the summons in this action, the defendant corporation did not have any agent, office or property within the State of New York and *was not doing business within the State of New York*, further argument would seem almost unnecessary in this Court, to dispose of the sole question thus presented for review, as to whether the Circuit Court had jurisdiction of the person of the defendant, in view of the authoritative determination of this precise proposition made by this Court in the case of *Goldey* vs. *Morning News*, 156 U. S., 518, and the numerous reaffirmations of the same in subsequent cases, hereinafter cited.

In the case of *Goldey* vs. *Morning News*, 156 U. S., 518, this Court says, in the opening paragraph of its opinion by Mr. Justice Gray, as follows:

> "This writ of error presents the question whether, in a personal action against a corporation, which neither is incorporated *nor does business within* the State nor has any agent or property therein, service of the summons upon its President, temporarily within the jurisdiction, is sufficient service upon the corporation,"

and in answering this question in the negative, and holding that such service could not be recognized and was void and should be set aside, the rule of law was established by this Court, which applies equally to all similar cases.

Notwithstanding the arguments of the plaintiff in error to the contrary, the facts in the present case do not distinguish it in any respect from the Goldey case and the same rule should be applied. The Mathieson Company was not present in the State of New York on the 18th day of April, 1901, and the pretended service of summons was void.

II.—Many cases have been cited at various times by plaintiff's counsel as supporting his contentions respecting the question of jurisdiction in this case, but upon examination it appears that the facts in each are materially different and that none of them is any authority for the plaintiff in the present case, as his counsel would lead the Court to believe.

In *Barrow Steamship Co.* vs. *Kane*, 170 U. S., 100, the jurisdiction was upheld because the steamship company, a foreign corporation, was regularly engaged in doing business in New York, and the summons was duly served upon a regularly appointed agent of the company in New York.

At the same time this Court, both in this case and in the Goldey case, states emphatically that it is immaterial whether such service is recognized as sufficient by the statutes or the judicial decisions of the State where the service is made, which answers one of the contentions of plaintiff's counsel. See also *St. Clair* vs. *Cox*, 106 U. S., 350.

In *Connecticut Mutual Life Insurance Co.* vs. *Spratley*, 172 U. S., 602, the Court found that although the foreign corporation, the Insurance Company, had no property in Tennessee, it was doing business within the State at the time of the service of process and had an agent therein, upon whom the same was duly served.

In *Henrietta Mining Co.* vs. *Johnson*, 173 U. S., 221, the proceeding was to set aside a judgment obtained in

Arizona against the Mining Company, and the Court found that the Mining Company was actually doing business in Arizona and that the summons had been served upon its duly authorized agent within the State and was valid. The question in this case was whether the Arizona judgment had been duly taken under the provisions of the Arizona statutes.

In *Société Foncier* vs. *Milligan*, 135 U. S., 304, where an application was made to set aside a judgment against the plaintiff in Texas two years after it had been entered, it was found by the Court that the foreign corporation was actually engaged in business in Texas, with a resident agent whose authority was unquestioned. In fact, the indebtedness upon which the action in the Texas Court was founded and the judgment was taken, had been contracted by the very agent upon whom the service of process in Texas had been personally made. Moreover, his authority was not questioned by the corporation.

In the *Matter of Hohorst*, 150 U. S., 653, which was upon a petition for a mandamus to the United States Circuit Court to take jurisdiction of the Hamburg-American Packet Company in a suit for an infringement of a patent, this Court held that the Steamship Company was regularly engaged in business in the State of New York and had a duly authorized agent there, and that service upon such agent, the corporation being regularly engaged in business in New York, was good service and conferred jurisdiction over the corporation.

In the case of *Meyer* vs. *Pennsylvania Lumber Insurance Co.*, 108 Fed. Rep., 169, the District Court in the Western District of New York held the service of process upon a resident director good, because the defendant Insurance Company was actually engaged in doing business in the State and the course of action arose within the State.

In *Southern Pacific Co.* vs. *Denton*, the only question

involved was whether either party was a resident of the district in which the action was brought.

Cowley vs. *Northern Pacific Railway Co.*, 159 U. S., 583, was a proceeding to set aside a judgment in a State Court claimed to be void for fraud, and this Court held, that the nature of this proceeding, originally brought in the State Court, under a special statute applicable to such cases, could not be changed into a suit in equity upon removal to the United States Court, and, because it had in fact been prosecuted in the United States Court as if a suit in equity, the petition could not be thereby deprived of the rights to which he was entitled in the original proceeding under the special statute.

In the case of *Reilly* vs. *Philadelphia & Reading R.R. Co.*, 109 F. R., 349, the District Court, Southern District of New York, Brown, *D. J.*, held upon the authority of Goldey *vs.* Morning News and *In re* Hohorst that:

> "It must be held that service of process upon a mere director who is found within the district, but who neither transacts any corporate business here, nor is charged with any business of the corporation, would not under the general law be sufficient service upon the corporation."

He found, however, that the defendant corporation was in fact actually engaged in business in the State of New York and had property within the State, and upon these facts held that the service was valid.

There is, therefore, nothing in this Reilly case to support the contention of the plaintiff, because even if the decision in the Reilly case be sound, the Mathieson Company, not having any property within the State of New York and not transacting any business within the State of New York, does not come within the exception made by Judge Brown.

In *Revans* vs. *Southern Missouri & Arkansas R.R.*, 114 F. R., 982, service upon defendant's president in New

York, also a resident of New York, was held to be good, because the defendant foreign corporation had a regular office for the transaction of its corporate business in the City of New York and its president there transacted all the business of the corporation and discharged all his duties as president, except such as took him out of the State, and this situation had continued for several years. Moreover, the cause of action itself arose in New York. The service was held good upon the authority of *Barrow Steamship Co.* vs. *Kane.*

In the case of the Steamship Co. *vs.* Kane, the very question contended for at length by the plaintiff in this action, that the New York statutes applied, was argued and considered at length and was decided adversely to the New York statute by this Court, which used the following language, in the opinion of Mr. Justice Gray, at page 111:

> "It is well settled in a suit against a corporation of one State brought in a Court of the United States held within another State, in which the corporation neither does business nor has authorized any person to represent it, services upon one of its officers or employees found within the State will not support the jurisdiction, notwithstanding that such service is recognized as sufficient by the statutes and the judicial decisions of the State."

The contention of the plaintiff in this case, that the question of jurisdiction should be considered only with reference to the New York statutes, has already been adversely decided and determined by this Court in the case of Barrow Steamship Co. *vs.* Kane.

In the case of *Empire Mining Co.* v. *Propeller*, *108 F. R., 901*, a totally different question is presented upon a motion to remand for lack of any jurisdiction. This is a familiar motion and has invariably been decided in the same way as in this Empire Mining case, which presents

nothing new. See Stalker *vs.* Pullman Palace Car Company, 81 F. R., 989.

Simonton, *C. J.*, in this Empire Mining Co. case at page 903, recognizes the difference between that case and the Goldey case, 156 U. S., 525, approving it and stating that there is no parallel between the two cases.

In the case of *Tootle* vs. *Coleman*, which more than any other case seems to have troubled plaintiff's counsel, the defendant was not a corporation, and the action was *in rem.*, the case has, therefore, no bearing upon the present appeal. If, however, any thing in the Tootle's case would apply to the present case it would be without authority in this Court because inconsistent and at variance with the rule in the case of Goldey *vs.* Morning News and Barrow *vs.* Kane, just cited.

III.—Plaintiff has intimated at various times that the cause of action in the present case arose in the State of New York, because as he alleges the contract between the Mathieson Company and plaintiff's assignor, T. T. Mathieson, was executed in New York. But this action is for an alleged breach of that contract. And, as already considered in this brief (*ante* p. 2), an examination of the contract itself (Record, pp. 9 and 10) shows that such breach could not have occurred in the State of New York, but must have been either at Saltville or Providence or in Great Britain. Inasmuch as the payments were to be in pounds sterling, and Mathieson was a resident of Great Britain, presumably the breach was in England.

It is evident, therefore, that the cause of action, if any, did not arise within the State of New York. There is, therefore, no basis nor any claim of jurisdiction on the ground that the cause of action arose within the State of New York.

IV.—Upon the facts that the defendant the Mathieson Alkali Works on April 18, 1900, when the alleged service

of the summons in this action was made upon it, did not have any agent, office or property within the State of New York, and was not doing business within the State of New York; and upon the authority of the cases referred to, the decision and order of the Circuit Court should be affirmed and the appeal of the plaintiff in error dismissed.

October Term, 1902.

Alfred Ely,
Of Counsel for Defendant.

Supreme Court of the United States.

No. 238.—October Term, 1902.

Jefferson B. Conley, Plaintiff in Error, vs. The Mathieson Alkali Works. } In error to the Circuit Court of the United States for the Southern District of New York.

[May 18, 1903.]

Mr. Justice McKenna delivered the opinion of the Court.

The plaintiff is a citizen of the State of New York, and the defendant was incorporated in the State of Virginia. The plaintiff as assignee of T. T. Mathieson brought this action in the Supreme Court of New York County, State of New York, against the defendant for moneys alleged to be due on a contract made and entered into by Mathieson and defendant. The complaint alleged that the contract was made in the city of New York on the 15th of August, 1893. The articles of agreement show that Mathieson's employment was as general superintendent for the term of eight years, in the erection and general management of the works of the corporation, "and also of their operation, after the same shall have been erected." The defendant had designated no agent upon whom service could have been made, and summons was served on R. T. Wilson and John G. Agar, two members of the board of directors of the corporation, both residents of the city of New York. They were not officers of the company. Before the time for answer had expired, on defendant's motion the cause was transferred to the United States Circuit Court for the Southern District of New York. A motion was made in that court to set aside the summons and service as null and void. Affidavits were presented by both parties, and ruling on them the court said that if the facts stated by the affidavits of the defendant were true, that at the time of the service of the summons and for some months before defendant corporation had ceased to do business in the State, the motion should be granted. But it was said that "the affidavits of complainant are mainly on information and belief, but annexed to them is a letter, the genuineness of which is not questioned, which bears date March 15, 1901, (two months and a half after the alleged cessation of business at Niagara Falls,) and signed by the treasurer of the defendant corporation, in which he speaks of the plant at Niagara Falls as still being operated by the defendant. Under these circumstances the court would not be warranted in granting this motion, in view of the conflict of fact. If, however, the

defendant feels assured that the apparent discrepancy can be explained, and is willing to pay the expenses of a reference, it may be sent to a master to take testimony and report to the court whether or not at the time of the service of the summons the defendant corporation was doing business within this State."

A reference to the master was made. After taking testimony (which occupies sixty-two pages of the record), the master reported that, beside its plant at Saltville, the defendant, prior to December 31, 1900, owned and operated a plant for the manufacture of caustic soda and bleaching powder by electricity, located at Niagara Falls, under a patented process, known as the Castner electrolytic process; that on the 31st of December, 1900, it conveyed this plant and all of the property of the defendant, of every kind and description, to the Castner Electrolytic Alkali Company, a corporation organized under the laws of Virginia; that the consideration expressed for the conveyance was one dollar and other valuable considerations, but that the substantial consideration was the entire capital stock of the Castner Electrolytic Alkali Company; that the selling agent for the products manufactured at Niagara Falls, before and after the transfer, was Arnold Hoffman & Co., a corporation organized under the laws of Rhode Island, and had and has its principal place of business in Providence, in that State; that said company was and is the selling agent for the Saltville products, with some exceptions, and that said corporation has a branch office in the city of New York, but the business dealings of the defendant corporation and of the Castner Company with Arnold Hoffman & Co are carried on through its Providence office; that the defendant, since a period prior to the 31st day of December, 1900, had, and still has, its principal place of business in the city of Providence, and that its books and records are kept there, and it has also an office force, consisting of several employes, that its bank account is also kept in said city, and that it has no office in the State of New York—none of its books, records or accounts are kept there, nor has it, since January 1, 1901, sold any of its products there; that a by-law of the company, adopted in 1896, provided that the directors should hold monthly meetings in the city of New York, on the second Wednesday of each and every month in each year, but that it did not appear, however, that meetings had been held in compliance with the by-laws, the fact being that they were held sometimes in Saltville and sometimes in Providence, and, during the year 1901, at least, were held not more than two or three times in New York city, and then at the branch office of Arnold Hoffman & Co., or at the office of R. T. Wilson & Co., bankers, in Wall street, a member of which firm was a director of the defendant company, and one of its principal stockholders; that the admissions in a letter of the treasurer of the company, March 15, 1901, "are fully explained by the fact that it followed earlier correspondence in

which the plan of disposing of the plant at Niagara Falls for the stock of a new company was brought to the attention of Mr. Pell," the president, to whom the letter was addressed. The master's report concluded as follows:

"Upon the facts thus outlined, it does not appear that the defendant corporation was, at the time of the service of the summons herein, viz., April 18, 1901, doing business within this State.

"The fact that it held the entire capital stock of the Castner Electrolytic Alkali Company and that the operations of that company were carried on under the same management as before December 31, 1900, is not material. The new corporation was a separate legal entity, and whatever may have been the motives leading to its creation it can only be regarded as such for the purposes of legal proceedings.

"It was that corporation alone which transacted any business in this State, notwithstanding it may have been for all practical purposes merely the instrument of the defendant corporation. (*Peo* v. *Am. Bell Telephone Co.*, 117 N. Y. 241; *United States* v. *The Same*, 29 Fed. Rep. 17.)"

The plaintiff excepted to the report, the rulings of the master on the admission of testimony, and to his conclusions. The report was affirmed and the service of summons sets aside and declared null and void. This ruling is assigned as error.

The fundamental proposition of plaintiff in error is that the State court had jurisdiction of the defendant in error, and that therefore the Circuit Court of the United States had jurisdiction. To sustain the jurisdiction of the State court subdivision 3 of section 432 and section 1780 of the Code of Civil Procedure of the State are cited. Subdivision 1 of section 432 provides for service upon certain enumerated officers of a foreign corporation; subdivision 2 provides for the designation of a person by the corporation upon whom process may be served. Subdivision 3 is as follows:

"If such a designation is not in force, or if neither the person designated nor an officer specified in subdivision first of this section can be found with due diligence, and the corporation has property within the State, or the cause of action arose therein, to the cashier, a director or a managing agent of the corporation within the State."

Section 1780 is as follows:

"SEC. 1780. An action against a foreign corporation may be maintained by a resident of the State or by a domestic corporation for any cause of action. An action against a foreign corporation may be maintained by another foreign corporation or by a non-resident, in one of the following cases only:

"1. Where the action is brought to recover damages for the breach of a contract, made within the State or relating to property situated within the State, at the time of the making thereof.

"2. Where it is brought to recover real property situated within the State.

"3. Where the cause of action arose within the State, except where the object of the action is to affect the title to real property situated without the State."

These sections, it is insisted, gave the State court jurisdiction, and that it follows that the Circuit Court had jurisdiction. But granting the existence of a cause of action, it is not every service upon an officer of a corporation which will give the State court jurisdiction of a foreign corporation. This was declared in *Goldey* v. *Morning News*, (156 U. S. 518.) The case arose in New York, and the question presented was "whether, in a personal action against a corporation which neither is incorporated nor does business within the State, nor has any agent or property therein, service of the summons upon its president, temporarily within the jurisdiction, is sufficient service upon the corporation."

As there was a difference between the rulings of the State court of New York and the Circuit Courts of the United States on the question, it was elaborately considered "upon principle and in the light of previous decisions of this court." The decisions were examined and the question was answered in the negative, and it was announced, as "an elementary principle of jurisprudence, that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction, except by actual service of notice within the jurisdiction upon him nor upon some one authorized to accept service in his behalf, or by his waiver, by general appearance or otherwise, of the want of due service. Whatever effect a constructive service may be allowed in the courts of the same government it cannot be recognized as valid by the courts of any other government." It was also held that the defendant by filing a petition for removal did not waive defects in the service of summons, and that objection could be made of such service in the Circuit Court of the United States in the same manner as if the action had been originally commenced there. *Goldey* v. *Morning News* was affirmed in *Wabash Western Railway* v. *Brou*, (164 U. S. 271.)

The principle announced in *Goldey* v. *Morning News* covers the case at bar. The residence of an officer of a corporation does not necessarily give the corporation a domicile in the State. He must be there officially—there representing the corporation in its business. (*St. Clair* v. *Cox*, 106 U. S. 350.) In other words a corporation must be doing business there, and, recognizing the necessity of this, the Circuit Court referred that issue to a master. The decision upon the issue was adverse to the contention of the plaintiff, and we cannot say that it was not sustained by the evidence and the presumptions which must be conceded to the report of a master and the judgment of the lower court. The defendant was competent to convey its property to the Castner Electrolytic Alkali Company, and afterwards make the locality of its own business Providence and Saltville. Whether the transfer to the latter company was fraudulent we certainly cannot decide from this record, and the by-law, which provided for a monthly meeting in New York, could not of itself keep the corporation in New

York. The testimony is positive that no business of the corporation was done in New York city after the transfer of the Niagara Falls plant; that all of the business of the corporation was conducted at Providence, except of a purely manufacturing character, which was conducted at Saltville.

The following is an extract from the testimony of the secretary and treasurer:

"The offices of the Mathieson Alkali Works at Providence conducted all the business of the company except that of a purely manufacturing character, which was conducted at Saltville. They keep there the general books of account, the books of record, the stock books. They had charge of the general course of the company's affairs and transacted its finances; collected the money and paid the bills. In fact, attended to all the business which generally comes under the conduct of a company's general office. This was done solely at Providence and nowhere else."

And he further testified that all of the goods of the corporation were sold at Providence. The affidavits filed by the defendants were as positive as the oral testimony. The order of the Circuit Court is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.